

IN THE SUPREME COURT OF THE UNITED STATES

Supreme Court, U. S.

F I L E D

AUG 13 1976

MICHAEL RODAK, JR., CLERK

T.I.M.E.-D.C., Inc.,

PETITIONER

VS.

NO. 75-672 CFX

UNITED STATES OF AMERICA, et al.,

RESPONDENTS

**CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE FIFTH CIRCUIT**

**BRIEF OF AMICUS CURIAE, OVER THE ROAD
DRIVERS ASSOCIATION, INC.**

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STATEMENT OF INTEREST

This brief is presented on behalf of Over The Road Drivers Association, Inc., a non-profit corporation organized and existing under the law of the State of Tennessee. Members of the corporation are all currently employed as over the road drivers by major trucking companies of the United States. As of the date of filing of this brief, over 900 over the road drivers are members of the organization.

As over the road drivers, the members of the corporation are directly interested in and affected by judicial orders which seek to implement the provisions of the Civil Rights Act of 1964, particularly in the area of grant

concluded without substantial dissent that the long maintained system of separate seniority lists and boards for the two categories of drivers have been used, if not in fact devised, to initiate and maintain racial discrimination to the end that the more desirable over the road driver positions were exclusively reserved to white drivers; with the black and other minority drivers being relegated to the city driver positions.²

The findings of the courts in this regard are too well established, and too well grounded in the evidence presented to permit of any argument to the contrary at this point, and it is not the intention of this association to address itself to that question.

Once it is assumed, however, that the discriminatory aspects of such lines of seniority were violative of the Civil Rights Act of 1964, the problem of appropriate judicial action pursuant to the mandate of the legislation remains unsolved.

Initially, the legislative history of the Act itself indicates the great likelihood that the Congress did not intend that the judicial decisions implementing its provisions be in form which would in any way cause the weight of change to rest upon the shoulders of previously employed drivers who had worked over the years under a system not of their making. It is submitted that any solution to the problem which serves to jeopardize vested seniority rights of presently employed over the road drivers in any particular is reverse discrimination in its purest form, and causes innocent laborers to bear

² Quarles v. Philip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968); J. D. Thornton v. East Texas Motor Freight, 497 F.2d 416 (6th Cir. 1974); Sabala v. Western Gillette, Inc., et al., 516 F.2d 1251 (5th Cir. 1975).

the cost of remedying a wrong which is not, and never has been, of their creation.

That the Congress was concerned that the legislation not be made the vehicle for impairment of seniority rights previously earned by existing workers within an industry is amply demonstrated by a memorandum prepared by the Department of Justice at the request of Senator Joseph Clark of Pennsylvania, one of the floor leaders urging passage of the legislation. That memorandum, in relevant part reads:³

First, it has been asserted that Title VII would undermine vested rights of seniority. This is not correct. Title VII would have no effect on seniority rights existing at the time it takes effect. If, for example, a collective bargaining contract provides that in the event of layoffs, those who were hired last must be laid off first, such a provision would not be affected in the least by Title VII. This would be true even in the case where owing to discrimination prior to the effective date of the title, white workers had more seniority than Negroes. . . It is perfectly clear that when a worker is laid off or denied a chance for promotion because under established seniority rules he is "low man on the totem pole" he is not being discriminated against because of his race. Of course, if the seniority rule itself is discriminatory, it would be unlawful under Title VII.

A second memorandum was prepared directly by Senators Joseph Clark and Clifford Case, and states flatly that Title VII would have no effect on established seniority rights and that an employer would never be obligated or, in fact, permitted to give newly-hired black

³ 110 Cong. Rec. 7207 (1964)

employees any form of special seniority rights at the expense of an earlier hired white worker.⁴

It is true that the memoranda in question were concerned with a situation where newly hired minority employees were claiming judicially created seniority rights based upon the allegation that but for the previous discriminatory practices they would have been hired at an earlier date. Under the circumstances presented by this litigation, a different situation exists factually in that the city drivers who are now given the right to transfer to over the road status are persons who have worked for the same employer for some appreciable length of time. They are not being newly hired; and they do have creditable employee time with the employer who has previously maintained a discriminatory seniority list. It is most earnestly submitted, however, that this factual distinction should not be used as the device to allow transfer of seniority rights intra-employer in such manner as to deprive existing over the road drivers of job security; job bidding rights and other benefits which they have become entitled to solely because of their own years of service to the employer and the industry.

The basis upon which so-called "slot seniority" transfer orders rest is the analysis first made by Judge Butz-

⁴ 110 Cong. Rec. 7213 (1964). The memorandum read, in part: "Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective. Thus, for example, if a business has been discriminating in the past and as a result has an all-white working force, when the title comes into effect the employer's obligation would be simply to fill future vacancies on a non-discriminatory basis. He would not be obliged—or indeed, permitted—to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or, once Negroes are hired, to give them special seniority rights at the expense of white workers hired earlier."

ner in *Quarles v. Philip Morris, Inc.*⁵ In *Quarles*, the court held that seniority system, whether created following the effective date of the Act or implemented long prior to that date, could withstand the sanction of the Act if the system was discriminatory in its nature.⁶

An early analysis of possible solutions to this problem has had considerable impact upon at least some of the courts which have found discriminatory seniority practices which predated the effective date of the act to be present. The law review note postulated three approaches, each of which was given an artful name. It was the argument of the author that present effects of a past pattern of discrimination were properly within the reach of Title VII, and that any one of the three suggested approaches could be taken to remedy that discriminatory policy's present effect on the discriminatee. These were styled, variously, the "status quo", the "rightful place" and the "freedom now" solution. Stated in an over-simplified manner, the "freedom now" approach would require that the discriminating employer immediately grant reallocation of job positions which would serve to give to blacks with plantwide seniority the right to immediately take any job for which he was qualified even at the price of displacing a junior white incumbent in that job. The "status quo" view would be to the effect that accrued seniority rights of white workers would be left intact. Present job allocation would remain undisturbed. Even though the seniority rights held by the incumbent white workers were found to have been

⁵ 279 F. Supp. 505 (E.D. Va. 1968)

⁶ In the opinion, Judge Butzner said: "... Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the act." 279 F. Supp. 505, at 516.

gained during the continuance of the discriminatory practices, the white workers' individual rights pursuant to that seniority would remain inviolate. The third alternative, or so-called "rightful place" view would eliminate the effects of past discrimination by adjusting seniority rights, but only with respect to future opportunities. The view would allow the incumbent black worker to compete for job openings on the basis of total employment seniority rather than on the basis of job or departmental seniority.

This analysis, and its stated exclusive alternatives, has exerted great influence on the courts in the years since its publication. The difficulty with this view, from the standpoint of the trucking industry is that its mode and method of operation is disparate from that of the usual industrial relationship which was involved in the reasoning of the author of the note and the courts which were considering the earlier cases. In *Quarles*, for example, the company had maintained departmental seniority rosters. The plaintiff, a black worker in the prefabrication department, had nine years on that departmental roster. He then sought to transfer into the warehouse shipping and receiving department in order to seek a job as a truck driver. The shipping and receiving department had been an all-white department until 1966.

The result of the holding in *Quarles*, therefore, was to allow the discriminatee to transfer from his existing department to the shipping department, with his plant-wide seniority intact. The result would be that such transferring employee would be able to secure any available truck driving position open in that department if his total seniority time exceeded that of another applicant with lesser total seniority.

In this situation presented by the previous maintenance of dual seniority lists between city and road drivers, however, the effect of such an order is not at all similar in its impact upon drivers with previously acquired road seniority rights. As established by the evidence in the court below in this case, the job rights of drivers within each of the boards are affected not only on a position-availability basis — as was true in *Quarles* — but also on status within that job classification. Senior drivers—in fact all drivers on road status—bid for jobs on a periodic basis; their status as being on regular run status or “extra board” position is a direct factor of their accumulated seniority. While, in the usual industrial context, the only questions which must be resolved by the court in applying the so-called “rightful place” of the discriminatee is job availability and lay-off status, much more is in question in this instance. In *Quarles*, if the transferring employee is granted the seniority rights he has accumulated on the separate seniority line, the only detrimental result to the incumbent white worker is loss of immediate opportunity to advance into a higher or different category of employment. In the instant case, however, the transferring employee, by being “slotted” into the road seniority list effectively displaces an existing employee as to rights previously acquired — not only as to future job opportunity.

In *Local 189, Papermakers v. United States*,⁷ the court recognized that white incumbent workers should not be displaced from their present positions by transferring

⁷ 416 F.2d 980 (5th Cir. 1969), cert. denied, 397 U.S. 919 (1970).

minority discriminatees with greater employer-seniority.⁸

The gross distinction between the two situations can be readily demonstrated by the use of a hypothetical comparison. Assume that Employer "A" is engaged in a manufacturing and distribution operation. As part of its business, the employer hires warehouse workmen, assembly line workers, and truck drivers who move the completed product from the manufacturing facility to wholesale outlets. Assume further that the employer hires a normal total of ten truck drivers in its business. If, at any time, one of the ten existing truck drivers jobs becomes vacant, or if additional job openings are created because of an increase in business, the "rightful place theory" would require that any otherwise qualified employee with 10 years plantwide seniority be entitled to fill that existing vacancy in preference to another worker who had acquired less than ten years seniortiy — even though the 10 years seniority had been acquired in a previously maintained separate and discriminatory seniority list which did not, under its terms, apply to truck driving positions. In such a situation the **only** detriment to the white employee is the fact he is not to be permitted to move into the truck driving job as early as otherwise would have been the case.

In the instant case, however, if it be assumed that previously discriminatory dual seniority lists have pre-

⁸ id, at 988, where the court said: "The Act should be construed to prohibit the **future awarding** of vacant jobs on the basis of a seniority system that "locks in" prior racial classification. White incumbent workers should not be bumped out of their **present** positions by Negroes with greater plant seniority; plant seniority should be asserted only with respect to new job openings. This solution accords with the purpose and history of the legislation."

cluded the transfer from a city driver position to a road driver position, the allowance of transfer with seniority rights does not properly fit the category of "rightful place", but, rather, has the practical effect of the "freedom now" approach. The incumbent white road drivers are not here seeking a job as a truck driver and being deprived of the opportunity to fill such a job opening in order to cure previous discrimination against minorities. Rather, immediately the city driver is "slotted" to the seniority list, existing and present attributes of the job position previously held by the white worker are detrimentally affected. This was not the intention and is not the permissible purpose of the Civil Rights Act of 1964.

While distinguishable on its facts, and on the legal issues in question, the language of the court in *Waters v. Wisconsin Steel Works*,⁹ established the view that it was not the purpose of the Act to legally sanction reverse discrimination which would place the full burden of curing the discriminatory practices of employers and unions upon the incumbent innocent white employees.¹⁰

That an absolute slotting transfer between the city and road seniority lists could well serve to grant an improper preference to the transferring driver and undue prejudice to the incumbent road drivers was noted by

⁹ 502 F. 2d 1309 (7th Cir. 1974)

¹⁰ *id.*, at 1320, where the court stated: "Title VII speaks only to the future. Its backward gaze is found only on a present practice which may perpetuate past discrimination. An employment seniority system embodying the 'last hired, first fired' principle does not of itself perpetuate past discrimination. To hold otherwise would be tantamount to shackling white employees with a burden of past discrimination created not by them but by their employer. Title VII was not designed to nurture such reverse discriminatory preferences."

the court in *Sabala v. Western Gillette, Inc.*¹¹ In that case, the opinion noted that the city drivers, during their early tenure as employees, had enjoyed the right to a guarantee of forty hours work per week; an established and obligatory minimum weekly wage; and a price for their work not far removed from the hourly rate of road drivers. Additionally, the road drivers similarly situated, had no hourly guarantee per week; and were required to pay their personal expenses while on the road. The conditions of work, again particularly during the years of low seniority on each of the separate lines of progression, were heavily weighted in favor of the city drivers, who were at home every night, and on every week-end; while the junior road drivers spent many days and weeks absent from their homes and routinely were required to work over week-end periods.¹²

The very real economic impact of a grant of slot seniority as an acceptable and routine solution to previously discriminatory practices under the act was forecast and discussed by the dissenting justices in *Franks v. Bowman Transp. Co., Inc.*¹³ In *Franks*, the case presented the question whether identifiable applicants who were denied employment because of race after the effective date and in violation of Title VII could be awarded seniority

¹¹ 516 F. 2d 1251 (C.A. 5th 1975)

¹² *id.*, at 1255, where the court stated: "The trial judge noted that such a complete merger of the seniority lines would prejudice recently hired or transferred road drivers including minority drivers because they could be bumped off their job by city drivers with lower seniority on the city roster. Further, city employees who during the early years of their employment have enjoyed a weekly guarantee and consequent higher pay as compared to similarly situated road drivers would be permitted to move to the road with a resulting freeze of lower seniority men in the least attractive low-paying road jobs."

¹³ 96 S. Ct. 1251 (1976)

status retroactive to the date of their respective employment applications. A majority of the Court, in opinion by Mr. Justice Brennan held that such order was within the power of the court, and that such was an acceptable if not exclusive way to deal with the problem of curing the present effects of earlier discriminatory practices. While the majority recognized that Sec. 706(g) of the act mentioned back pay awards as the only remedy, the opinion concluded that the act, in overall provision, vested broad powers to the courts to fashion equitable relief which would serve to cure the effects of past discrimination.¹⁴

It is further the case, however, that the majority itself recognized that an award of retroactive seniority was not required under the acts provisions, and, indeed, was not requisite in all circumstances.¹⁵

The majority disposed of the claims of persons holding rights of seniority pursuant to the existing seniority list treatment as being not of such nature as to preclude their conclusions. This was approached from two points. Initially, the majority concluded that a sharing of the burden of past discrimination is presumptively necessary; with this conclusion being grounded in part upon the holding that the attainment of a great national policy should not be confined within the limits of equitable relief applicable in private controversies.¹⁶ Second,

¹⁴ *id.*, at 1264, where the Court said: "This is emphatic confirmation that federal courts are empowered to fashion such relief as the particular circumstances of a case may require to effect restitution, making whole insofar as possible the victims of racial discrimination in hiring." See also: Note 21, at page 1264.

¹⁵ *id.*, at page 1267

¹⁶ *id.*, at page 1271

the majority found that seniority rights are not indefeasibly vested, and may be modified by statutes furthering a strong public interest¹⁷

In his concurring and dissenting opinion, Chief Justice Burger succinctly stated the inherent impropriety of the majority's view. He said: ¹⁸

"... I would stress that although retroactive benefit-type seniority relief may sometimes be appropriate and equitable, competitive type seniority relief at the expense of wholly innocent employees can rarely, if ever, be equitable if that term retains traditional meaning. More equitable would be a monetary award to the person suffering the discrimination."

Mr. Justice Powell, joined by Mr. Justice Rehnquist, was of the view that a distinction should be drawn between "benefit seniority" and "competitive seniority".¹⁹ Benefit seniority, having to do with economic fringe benefit entitlement, such as vacation time, pension benefits, and similar matters, can obviously be ordered granted to discriminatees without impairing in any way the job security or job rights of existing employees. To the contrary, a grant of competitive seniority on a retroactive basis will have an immediate bearing and effect on the job circumstances of existing innocent employees.

Perhaps the most telling argument in favor of the

¹⁷ *id.*, at page 1271.

¹⁸ 96 S. Ct. 1251, at 1272.

¹⁹ *id.*, at 1273, where the dissent states: "Its (the majority) holding recognizes no meaningful distinction, in terms of the equitable relief to be granted, between 'benefit-type' seniority and 'competitive-type' seniority."

dissent view in Frank, is the undoubted fact that a grant of retroactive seniority on a competitive as well as benefit base as a substituted remedy for back pay award to the aggrieved employee, serves to remove entirely from the shoulders of the employer and the involved union any burden required in order to correct their prior discrimination and places that burden upon the weaker economic shoulders of purely innocent employees. It is one thing to visit the sins of the father upon the sons; it is quite another to relieve the sons of the sinning father, and visit his earlier sins on the sons of strangers to the misdeed.

In ultimate result, the routine grant of retroactive seniority rights in cases arising under Title VII will undoubtedly be looked upon with favor by those persons most directly responsible for the discrimination in the first instance. Both the employer and the union will be faced with the responsibility for payment of back pay benefits to those persons discriminated against if that solution to the problem is adopted by the courts. On the other hand, if the effects of past discrimination are cured by a grant of retroactive seniority, there will be no economic impact on either.

In sum, the approval of the Court of relief confined to a grant of full retroactive seniority to past discriminatees will have economic and social consequences which are totally inconsistent with the principles of equity, and with the broad purposes of the Civil Rights Act of 1964. There can be no question but that, since 1964, many employers have made good faith efforts to comply with the spirit of that legislation. Those efforts have included the hiring of minority employees on a broad scale. As applied to the instant case, this would include the undoubted fact that trucking firms across the nation have

hired many minority drivers as over the road drivers in the last ten years. Those minority drivers have now begun to accumulate both benefit and competitive seniority. There is no doubt but that the granting of slot seniority rights to persons earlier discriminated against will adversely affect the job security of those minority drivers. Across the nation today, instance after instance can be recorded wherein black drivers hired in recent years for over the road service are being laid off or lowered from bid-run status to extra board status because their earned positions on the seniority roster have been altered by ordered transfer of drivers from the city roster to over the road status. Most paradoxical of all is the fact that in many instances, the transferring city driver is not of a minority race, and is not in that category of persons which the act was designed to serve.²⁰

CONCLUSION

The purposes and objectives of the Civil Rights Act of 1964 are not well served by orders which attempt to cure earlier discrimination at the expense of the job security of innocent workmen, many of whom are themselves members of ethnic minorities. Other available relief serves to cure the past inequities and forecast a future labor situation which precludes discrimination without infringing upon the economic well-being of the present labor force. Equity demands and reason dictates that benefit seniority not be the usual or preferred solu-

²⁰ A clear example of this type situation is involved in the case of *Cox v. Gordons Transports, Inc.*, 513 F.2d 630, (C.A. 6 1975), in which slot seniority orders have now resulted, in the transfer of six city drivers to over the road boards. Four of the drivers are black, two are white. The result of the transfer has been the lay-off of five over the road drivers with lesser seniority. All are black.

tion to the multi-faceted problem of past discrimination. Back pay relief, coupled with benefit-type seniority, and a plan of job security to discriminatees accords with the intent of the Act, and with established principles of equity.

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